IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

Petitioners,

vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this proceeding on December 19, 1977. The said judgment denied a motion by petitioners for leave to appeal to the Court of Appeals.

Opinions Below

In denying petitioners' motion for leave to appeal to it the Court of Appeals issued no opinion. A similar motion was denied, without an opinion, by the Appellate Division of the New York State Supreme Court, First Judicial Department (the "Appellate Division") on October 25, 1977.

On September 13, 1977, the Court of Appeals granted a motion by respondents to dismiss the appeal by petitioners to the Court of Appeals taken as of right. It rendered no opinion.

The opinion of the Appellate Division is reported at 58 A.D.2d 751, 396 N.Y.S.2d 223 (1st Dept. 1977) (A. 1-3)[1] The opinion of the Supreme Court of the State of New York, New York County (A. 4-9) is unreported.

Jurisdiction

The judgment of the New York Court of Appeals was entered on December 19, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Does the due process clause of the Fourteenth Amendment govern the procedure by which an application for a zoning variance is determined, under a zoning resolution such as that of the City of New York?

2. What kind of hearing is required for the making of the findings of fact mandated by § 72-21 of the Zoning Resolution of the City of New York?

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[1] References to the Appendix are indicated as A.—.

Constitutional Provision and Statutes Involved

United States Constitution

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, § 1.

Article 78 of the New York Civil Practice Law and Rules (McKinney 1963)

"§ 7801. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. . . . [at 16].

§ 7804. Procedure.

• • •

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. . . ." [at 178-79.]

Zoning Resolution of the City of New York (Vol. I)

"72-21

Findings Required for Variances

When in the course of enforcement of this resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular *zoning lot;* and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the *use* or *bulk* provisions of the resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances

created generally by the strict application of such provisions in the neighborhood or district in which the *zoning lot* is located.

(b) That because of such physical conditions there is no reasonable possibility that the *development* of the *zoning lot* in strict conformity with the provisions of this resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such *zoning lot.* This finding shall not be required for the granting of a variance to a non-profit organization.

(c) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the *zoning lot* is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(d) That the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title. Where all other required findings are made, the purchase of a *zoning lot* subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(e) That within the intent and purposes of this resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be

supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection." [at 292-93.]

Statement of the Case

Each of the individual petitioners owns and resides in a cooperative apartment in the building owned by petitioner 215 East 72nd Street Corporation ("215 Corp."), in the Borough of Manhattan, City and State of New York. The building is on the northern side of East 72nd Street, across East 72nd Street from a parcel of real property owned by respondent 72nd Street Associates ("Associates"), a partnership of which respondent David Berg is one of the partners. The parcel is bounded on the west by the entire blockfront, on the eastern side of Third Avenue, from East 72nd Street to East 71st Street, and on the south by the northern side of East 71st Street.

Respondents Joseph B. Klein, as Chairman, Philip P. Agusta, as Vice Chairman, and Harry M. Carroll, John J. Walsh and John B. Cincotta, comprised the Board of Standards and Appeals of the City of New York (the "Board").

On March 18, 1976, respondent Samuel Lindenbaum, who was actually the attorney for respondents Associates and Berg, applied to the Board for substantial variances[2] from

[2] The variances sought were: (1) a variance allowing the building to be constructed with a greater ratio of total floor space to lot area than permitted by the zoning resolution; (2) a variance from the zoning requirement that the building be set back

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the Zoning Resolution of the City of New York (the "Zoning Resolution"), in connection with the proposed construction of a 35 story residential apartment building on its parcel. Petitioners and a large number of other nearby residents opposed the application, at a "kind of hearing'" held by the Board.

The grant of variances by the Board is authorized and governed by § 72-21 of the Zoning Resolution. Variances may be granted if "it is alleged that there are practical difficulties or unnecessary hardship." The section mandates "that as a condition to the grant of any such variance, the Board shall make each and every one of the . . . findings . . ." set forth in the section.

From the very outset of the Board proceeding, petitioners objected to the procedures of the Board as violative of the mandates of the due process clause of the Fourteenth Amendment, with respect to the "individualized fact finding" (*Gonzalez* v. *United States,* 348 U.S. 407, 412 (1955)) required by the Zoning Resolution. Some of those procedures are set forth in the Board's Rules of Procedure (the "Board Rules"). The remainder appear to be based simply upon the unwritten and self-serving traditions of the small and select group of attorneys, architects and engineers who dominate most of the important business before the Board.

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from the lot line; (3) a variance allowing the builders to exceed by more than half the density limits of the zoning resolution as to the number of zoning rooms; (4) a variance permitting a reduction in the mandated number of off-street parking spaces; and (5) a variance waiving the provision of the zoning resolution which requires a specified minimum amount of space between buildings located on the same zoning lot.

[3] *See Wolff* v. *McDonnell,* 418 U.S. 539, 557 (1974); Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267 (1975) [hereinafter *"Friendly"*].

These written and unwritten rules barred any cross-examination, sanctioned the proof of critical adjudicative facts[4] by unsworn statements, documents and letters, condoned the practice of having the same persons to perform the functions of attorney, principal and witness, and otherwise rendered it impossible for petitioners to participate meaningfully in the Board's fact finding process. All of petitioners' objections were overruled.

On July 13, 1976, a kind of hearing was held. On September 14, 1976, the Board granted each and every one of the variances sought. In so doing it did not make the specific findings required for variances by the Zoning Resolution. The Board instead simply, "RESOLVED, that [it] does hereby make each and every one of the required findings . . . and that the application be and it hereby is granted under § 72-21 of the Zoning Resolution . . . ."

Pursuant to Article 78[5] of the New York State Civil Practice Law and Rules ("CPLR"), petitioners, on October 14, 1976, petitioned the New York State Supreme Court, New York County, for review of the Board's action authorized by that Article. On or about January 20, 1977, the Board filed its Answer to the petition and on or about January 21, 1977, respondents Lindenbaum, Associates and

[4] The term "adjudicative facts," as used in this petition, means, as defined by Davis in his treatise on administrative law, the "facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case." K. Davis, *Administrative Law Text* § 7.03 (1972); *see also Marshall* v. *Sawyer*, 365 F.2d 105 (9th Cir. 1966); *Wood County Bank* v. *Camp*, 348 F.Supp. 1321 (D.D.C. 1972).

[5] Article 78 provides for the "[r]elief previously obtained by certiorari to review, mandamus or prohibition . . . ." For a statement of the history and function of Article 78, *see* 8 Weinstein, Korn and Miller, *N.Y. Civil Practice* § 7801.01 *et seq.* (1977).

Berg filed their Answer. Each of the answers set forth "A Complete Affirmative Defense." Paragraph "28." of the Board's Answer alleged:

> "28. In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the c[illegible]ions set forth in its resolution, *the Board,* on the [illegible]f evidence in the record, an inspection of the subje[illegible]perty by a committee of the Board, and by reason of the expert knowledge of the Board, *made the following findings*" (emphasis supplied).[6]

Following the paragraph quoted above, the Board's Answer set forth nineteen subparagraphs of detailed "findings," including each of the specific findings required by the Zoning Resolution for the grant of the variances. The Board never made the "findings" set forth in its Answer. No such "findings" appeared in the "certified transcript of the record of the proceedings" (CPLR § 7804(e)) filed by the Board. The only sense in which it might be claimed that the Board made the said "findings," albeit six months after its decision, is that the Chairman of the Board, respondent Klein, verified the Answer on January 18, 1977.

On February 3, 1977, the New York State Supreme Court dismissed the Article 78 petition. In doing so it rejected petitioners' constitutional due process arguments, as well as arguments by petitioners based upon violations by the

[6] The answer by Lindenbaum, *et al.*, alleged that: "22. The Board's decision granting the variances was reasonable, prudent and within the sound exercise of the Board's discretion. The resolution of the Board and its findings of fact, set forth *in its verified answer and return to the petition, are fully supported by the evidence of record . . .*" (emphasis supplied). The said answer thereafter set forth thirteen paragraphs and numerous sub-paragraphs of such "evidence", covering substantially the same matters as the Board's "findings" in its Answer.

Board of its own Rules.[7] Petitioners appealed to the New York State Supreme Court, Appellate Division, First Department, arguing again their constitutional claims. The Appellate Division affirmed the lower court decision, but in doing so stated that:

> "We are perturbed by the point well presented by the appellant that the Board in granting the application for variances, did not make specific findings, but merely noted that required findings had been made. It was not until the answer and return in this Article 78 proceeding that the facts found, which lead to its conclusions were disclosed. Further, the Zoning Resolution of the City of New York, § 72-21, requires these findings. Whether this accords with procedural due process, *cf. Goldberg* v. *Kelly*, 397 U.S. 254, is a question properly raised." (A. 3).

Petitioners appealed to the New York State Court of Appeals under CPLR § 5601(b), permitting an appeal to it as of right,

> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

Respondents Lindenbaum, *et al.*, thereafter moved to dismiss the appeal to the Court of Appeals on the ground that no substantial constitutional question was directly involved. The Court of Appeals granted the said motion by order dated September 13, 1977. Both the Appellate Division and the Court of Appeals thereafter denied, by

[7] In doing so the Court misstated the thrust of petitioners' constitutional arguments, referring "to the contentions of the petitioners that the Board did not follow its own procedural rules and *thus* deprived petitioners of their constitutional rights . . ." (emphasis supplied) (A. 8).

orders dated October 25, 1977 and December 19, 1977, respectively, a motion by petitioners for leave to appeal to the Court of Appeals, made under CPLR § 5602, providing for appeals to the Court of Appeals by permission.

Reasons for Granting the Writ

I. This Case Involves Important Constitutional Issues Upon Which This Court Has Not Yet Passed.

Circuit Judge Henry J. Friendly has stated that:

> "Since then [*Goldberg* v. *Kelly*, 397 U.S. 254 (1970)], we have witnessed a due process explosion in which the [Supreme] Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society." *Friendly* at 1268.

Judge Friendly discussed *Goldberg* and its "considerable progeny" (*id.* at 1273), pointing out "some turning back" (*id.* at 1274) from hearing requirements in the 1973 term of the Court and "a resumption of the trend toward greater and greater insistence on hearings" (*id.* at 1274), in the 1974 term.[8]

[8] Prior to Judge Friendly's article, the "due process explosion" had reached the following areas: medical examiners' hearings, *Withrow* v. *Larkin*, 421 U.S. 35 (1975); suspension of public high school students, *Goss* v. *Lopez*, 419 U.S. 565 (1975); Interstate Commerce Commission certification "of public convenience and necessity hearings," *Bowman Transportation, Inc.* v. *Arkansas—Best Freight System, Inc.*, 419 U.S. 281 (1974); dismissal hearings for nonprobationary federal employees, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); Food and Drug Administration decision to withdraw "new drug applications," *Weinberger* v. *Hymson Wescott & Dunning, Inc.*, 412 U.S. 609 (1973); probation revocation proceedings, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); state

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The "due process explosion" has not yet reached zoning or related land use proceedings. Beginning with *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court has decided 13 zoning cases,[9] all of which have involved *substantive* rights.

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optometry board hearings, *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); dismissals of teachers at public institutions, *Perry* v. *Sindermann*, 408 U.S. 593 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); parole revocation proceedings, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); procedures for the repossession of chattels, *Fuentes* v. *Shevin*, 407 U.S. 67 (1973); proceedings for termination of social security disability payments, *Richardson* v. *Wright*, 405 U.S. 208 (1972); proceedings for the termination of governmental employees, *Connell* v. *Higgenbotham*, 403 U.S. 207 (1971); suspension of driver's license hearings, *Bell* v. *Burson*, 402 U.S. 535 (1971); posting of names of individuals deemed unfit to consume alcoholic beverages, *Wisconsin* v. *Constantineau*, 400 U.S. 422 (1971); mail violation hearings, *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970); termination procedures for old age benefits, *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); termination procedures for public assistance, *Goldberg* v. *Kelly*, *supra*, and; state commission hearings relating to criminal violations of labor-management relation laws, *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969).

Since then this Court has ruled upon the hearing requirements of procedural due process in these areas: dismissal of students for unsatisfactory academic performance, *Board of Curators* v. *Horowitz*, 46 U.S.L.W. 4179 (February 28, 1978); procedures for removal of foster children from their foster homes, *Smith* v. *Organization of Foster Families for Equality and Reform*, 97 S.Ct. 2094 (1977); imposition of corporal punishment in public schools, *Ingraham* v. *Wright*, 97 S.Ct. 1401 (1977); transfer of prison inmates, *Montanye* v. *Haynes*, 96 S.Ct. 2543 (1976) and *Meachum* v. *Fano*, 96 S.Ct. 2532 (1976); termination of employment of a city policeman, *Bishop* v. *Wood*, 96 S.Ct. 2074 (1976); defamation of reputation, *Paul* v. *Davis*, 96 S.Ct. 1155 (1976), and; the termination of social security disability benefits, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

[9] *Village of Euclid* v. *Ambler Realty Co.*, *supra* [comprehensive zoning ordinance held constitutional]; *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927) [zoning ordinance not unconstitutional as applied]; *Gorieb* v. *Fox*, 274 U.S. 603 (1927) [set-back provision in zoning ordinance held constitutional]; *Nectrow* v. *City*

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This case poses important questions of the applicability of procedural due process requirements, particularly of *Goldberg* and its progeny, to the quasi-adjudicative aspect[10] of zoning law and practice, the actions of zoning boards of appeals on applications for variances.[11]

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of Cambridge, 277 U.S. 183 (1928) [restrictions in zoning regulations must bear a substantial relation to the public health, safety, morals, or general welfare]; *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928) [city ordinance permitting construction of philanthropic institutions in zoning district only on written consent of nearby landowners held unconstitutional]; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) [ordinance regulating dredging and pit excavation held valid exercise of police power]; *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) [zoning ordinance limiting occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons held constitutional]; *Warth* v. *Seldin*, 422 U.S. 490 (1975) [petitioners, residents of Rochester, New York, held not to have standing to challenge the allegedly unconstitutional zoning practices of a nearby suburb]; *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) ["comprehensive metropolitan plan" to desegregate Chicago's public housing held constitutional]; *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) [requirement of approval by 55% of voters in referendum before institution of land use changes held constitutional]; *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976) [city zoning ordinance restricting location of adult movie theaters and book stores held not to violate due process, equal protection or freedom of speech]; *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) [decision of petitioner Village to deny rezoning application held not violative of equal protection clause]; *Moore* v. *City of East Cleveland*, 97 S. Ct. 1932 (1977) [ordinance making it a crime for son and grandsons living with homeowner held unconstitutional].

[10] *See* ALI Model Land Development Code, Art. 2 (1976); 3 R. Anderson, *American Law of Zoning* § 16.01 (1968) [hereinafter *Anderson*]; 1 P. Rohan, *Zoning and Land Use Controls* § 1.02[5] *et seq.* (1977) [hereinafter *Rohan*]; 5 N. Williams, *American Land Law Planning* 2-3 (1975) [hereinafter *Williams*].

[11] A variance has been defined in 2 *Anderson* at § 14.02 as:

"... an authorization for the construction or maintenance of a building or structure, or for the establishment or main-

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Variance provisions are found in virtually all zoning ordinances. This is in part owed to the fact that the enabling acts in all fifty states were originally based, and in 47 states are still based, on the Standard State Zoning Enabling Act ("SEZA") prepared by the U.S. Department of Commerce in 1922. 2 *Williams* at 355. It authorized variances "from the terms of the ordinance where literal enforcement would result in unnecessary hardship." ALI Model Land Development Code, Commentary at 1-2 (1976).

A provision for variances is necessary to prevent the ordinance being deemed void and unconstitutional in its application to particular property, if such application results in unique hardship, rendering it arbitrary, oppressive or confiscatory.[12] The quasi-judicial action of a board of zoning appeals, in acting upon a variance application, is to be distinguished from the legislative or quasi-legislative action of adoption or amendment of the zoning ordinance.[13] Somewhere between the two is the action involved in the rezoning of a specific piece of land.[14]

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tenance of a use of land, which is prohibited by a zoning ordinance. It is a right granted by a board of adjustment pursuant to power vested in such administrative body by statute or ordinance, and is a form of administrative relief from the literal import and strict application of zoning regulations." (footnotes omitted).

For a discussion of "variances" in the slightly different context of the Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676; *see Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975).

[12] *See Chicago* v. *Sachs*, 1 Ill.2d 342, 115 N.E.2d 762 (1953); *Schaible* v. *Board of Adjustment*, 134 N.J.L. 473, 49 A.2d 50 (1946).

[13] *Rubin* v. *Board of Directors*, 16 Cal.2d 119, 124, 104 P.2d 1041, 1043 (1940); *see also Rohan* § 1.02[5] *et seq.*; 5 *Williams* at 1-3.

[14] *Compare South Gwinnet Venture* v. *Pruitt*, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S. 837 (1974), *reversing en banc*, 482 F.

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In order to discharge its quasi-adjudicatory function, it is almost universally required that a zoning board of appeals make specific findings and base its decision on such findings.[15] The duty to make the specific findings "is not met by parroting the highly generalized statutory phrases . . . ." *Lindburg* v. *Zoning Board of Appeals*, 8 Ill.2d 254, 133 N.E.2d 266 (1956).[16]

Section 72-21 of the Zoning Resolution is in all respects typical in its requirement of specific findings. Violations by the Board of its duty to make findings as the basis of its decision, and substitution of *post-hoc* rationalization if and when the decision is reviewed by court litigation, have been adjudged unlawful. *Application of New York City Housing & Redevelopment Authority* v. *Foley*, 23 A.D.2d 84, 258 N.Y.S.2d 526 (1st Dept. 1965). Inexplicably, New York State courts countenance the violation by stating that remand to the Board is pointless. *Id.* at 87, 258 N.Y.S.2d at 529. Courts of other states have ruled differently.[17]

The practices of zoning boards of appeals under thousands of zoning ordinances, virtually all of which vest the

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2d 389 (5th Cir. 1973), *with Chrobuck* v. *Snohomisa County*, 78 Wash. 2d 858, 480 P.2d 489 (1971) and *Ward* v. *Village of Skokie*, 26 Ill.2d 415, 186 N.E.2d 529 (1962). *See also* ALI Model Land Development Code, Note to § 2-312 (1976).

In *Montgomery County* v. *Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied sub nom., Funger* v. *Montgomery County*, 46 U.S.L.W. 3526 (February 21, 1978), the administrative body was not acting in a quasi-judicial capacity.

[15] *See, e.g., Clark Heating Oils, Inc.* v. *Zoning Board of Appeals*, 159 Conn. 234, 268 A.2d 381 (1970); *Baker* v. *Zoning Board of Review*, 102 R.I. 134, 228 A.2d 859 (1967); *Collins* v. *Behan*, 285 N.Y. 187, 33 N.E.2d 86 (1941); *see also* 3 *Anderson* § 20.41.

[16] *See also* 3 *Anderson* § 20.41; 8 E. McQuillon, *The Law of Municipal Corporations* § 25.272 (3rd ed. 1976); 2 E. Yorkley, *Zoning Law and Practice* § 15-17 (Cum.Supp. 1976).

[17] *See Lindburg* v. *Zoning Board of Appeals, supra; see also Badanek* v. *Schroskey*, 21 Mich. App. 582, 175 N.W.2d 784 (1970).

power to grant variances in zoning boards of appeals, the tens of thousands of variance applications each year, the millions of people whose interests are significantly affected by such applications, and the hundreds of millions of dollars of property values probably affected thereby,[18] have prompted a number of studies and criticisms of the variance process. One of the more authoritative studies states that:

> "Few legal institutions have been more consistently and vigorously criticized than zoning boards of adjustment, whose major function is to consider applications for variances. Commentators, while not denying that variances are a necessary 'flexibility device,' assert that the boards grant relief too freely, flouting the law by following their own permissive inclinations rather than the stricter standards laid down by the courts." (footnotes omitted)[19]

One of the means by which zoning boards of appeals follow "their own permissive inclinations rather than the

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[18] *See* A. Manuel, *Local Land and Building Regulation* (National Commission on Urban Problems 1968). In addition to the municipal zoning boards of appeals ruling upon variances, there are numerous county, regional, state and interstate agencies now exercising zoning powers and necessarily acting upon variance or analogous applications. *See* Bosselman and Callies, *The Quiet Revolution in Land Use Control, A Report to the Council on Environmental Quality* (1971); 5 *Williams* § 160 *et seq.;* Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies,* 15 Santa Clara L. 50 (1974) [hereinafter *Sullivan*].

[19] Bryden, *The Impact of Variances: A Study of Statewide Zoning,* 61 Minn. L. Rev. 769 (1977) [hereinafter *Bryden*]; *see also* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirement of Due Process and Judicial Review,* 10 Ga. L. Rev. 753 (1976); *Sullivan.*

In addition to the criticisms cited by Professor Bryden, *see* J. Makielski, Jr., *The Politics of Zoning: The New York Experience* (1966); Makielski, *Zoning: Legal Theory and Political Practice,* 45 J. of Urban L. 1 (1967).

stricter standards laid down by the courts," *Bryden* at 7, "is by parroting the highly generalized statutory phrases . . .," *Lindburg* v. *Zoning Board of Appeals, supra,* in lieu of making the detailed findings required by law. The Board's practice in doing so was specifically addressed in a study by the Citizens Union Research Foundation, Inc. of the City of New York, published in 1977.[20] The study presented "a detailed analysis of 168 cases in the Boroughs of Manhattan and Brooklyn that were before the Board in 1971, 1972, 1973 and 1974." (*Id.* at 9). Part of its "SUMMARY OF FINDINGS" follows:

> "Although Section 72-21 of the Zoning Resolution requires the Board to set forth each of Five Findings supported by substantial evidence before it can grant a variance, in practice these findings have often served little more than a ceremonial function.'"[21]

A second means by which zoning boards, particularly the Board herein, follow "their own permissive inclinations," is by relying upon inspection of the property and their own presumed expertise, but nowhere indicating to the parties or to a reviewing court the facts thereby learned and presumably relied upon as evidence. The

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[20] S. Haycock, *The Board of Standards and Appeals: An Analysis Of The Decision Making Process* (1977) [hereinafter the "Citizens Union Study"].

[21] In addition to the statement in the SUMMARY OF FINDINGS, the following comment appears at pages 21 and 22:

> "No case by case evolution of standards for variances has been possible as Board rulings generally contain only the formal orders of the Board. There is no oral or written opinion of the Board telling interested persons why a decision was made. The Board simply states that:
>
> Whereas, the premises and surrounding area were inspected by a Committee of the Board; and
>
> Whereas, the Board has determined that the evidence in the record supports the findings required to be made under Section 72-21 of the Zoning Resolution, and that the applicant is therefore entitled to relief on the grounds of practical difficulty and/or unnecessary hardship." (footnote omitted).

problem is the same as that posed by this Court, per Cardozo, J., in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 303 (1937):

> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

In this case the Board indulged in its ritualistic obfuscation. The introductory sub-paragraph of paragraph "28" of its Answer, following which are the ten pages of the detailed *post-hoc* "findings," states:

> "In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the conditions set forth in its resolution, the Board, on the basis of evidence in the record, an inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board, made the following findings:"

To the practices described above, may be added: the prohibition of cross-examination, the frequent use of and reliance upon unverified "evidence," the denial of any right of subpoena, the absence of any discovery, and the dual or treble capacities in the proceeding of those seeking the variance.[22] The proceedings are also frequently con-

[22] In this case Mr. Lindenbaum was the "Applicant" and also the attorney for respondent Associates, the owner of the property. Respondent Berg was a partner. A principal aspect of the Application to the Board was a 17 page, single space letter, entitled "STATEMENT OF FACTS," signed "Samuel H. Lindenbaum of Rosenman Colin, et al., Applicant." The letter is under the letterhead of "Rosenman Colin Freund Lewis & Cohen." Berg, an attorney and also a real estate developer, interposed affidavits before the Board, furnishing thereby both lay and expert testimony. He also was of counsel on court papers in the litigation.

ducted in an atmosphere of hostility to any persons and interests outside of the zoning establishment comprised of the boards themselves and the generally small number of specialists representing the applicants for the variances.[23]

While no single one of the practices may render the process unconstitutional, the aggregate of the practices denies non-zoning establishment outsiders a fair hearing. Petitioners submit that the time has come for this Court to consider the ventilation of zoning boards' cloistered chambers with the fresh air of post-*Goldberg* procedural due process.

II. The Board Violated Procedural Due Process.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* at 481. As Justice Frankfurter stated in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 162 (1951), quoted in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961),

> "unlike some legal rules [procedural due process] is not a technical conception with a fixed content unrelated to time, place and circumstances."

[23] The Citizens Union Study found that the Board granted the variances in 133, or 79.2% of the 168 cases, and denied the variances in 13, or 7.7% of the cases (*id.* at 25). In 121 cases or 72%, there were intervenors; in 44 cases the interventions were consents only, in 39 cases there were objectors only, and in 38 cases there were both consentors and objectors. (*Id.* at 25). In only 8 cases were lawyers retained by intervenors. The Study analyzed the representation of applicants by three particular attorneys, including Samuel Lindenbaum, Esq., the applicant before the Board in this case, stating:

> "Samuel Lindenbaum was involved only in Manhattan cases, 89% of the time as a representative of a professional developer. He was the attorney in 76% of the cases involving buildings of more than 16 stories. In Brooklyn, Leonard Rothkrug was the most frequent representative; 60% of all of his cases were businessmen. It is worth noting that seldom did either of these attorneys lose a case." (*Id.* at 13).

If there ever was, there is no longer, any formula under which the name given to a proceeding, e.g. "legislative" or "adjudicatory," or to the facts at issue in the proceeding, determines whether a "trial-type hearing," with all of its incidents, is required.[24] What does determine the kind of hearing[25] due process requires is a sophisticated analysis of the nature of the proceeding, particularly of the facts at issue. Based upon such analysis, what is a fair hearing "at a meaningful time and in a meaningful manner" can be ascertained. *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). An important aspect of that analysis is consideration of the "three distinct factors" set out in *Mathews* v. *Eldridge, supra,* at 334-35:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

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[24] *Friendly* at 1268.

Professor Davis, analyzing *Mathews* v. *Eldridge, supra,* and *Goss* v. *Lopez, supra,* describes the requirement of the particularized analysis as follows:

> "A main idea of the old law was that each agency for each function had to make a choice between trial procedure and no trial procedure, and courts would approve or disapprove each such choice. *The main idea of the new law, represented by Eldridge and Goss, is that each agency for each function must work out procedure that will be both efficient and fair—procedure that may include some of the elements of a trial and not others.*" (emphasis added). K. Davis, *Administrative Law of the Seventies* § 7.00-1-2 (Supp. 1977).

[25] There is no question in this case of the applicability of procedural due process, requiring *some* kind of hearing. *But see Board of Curators* v. *Horowitz, supra; Paul* v. *Davis, supra.*

As to the first *Mathews* factor, all of the petitioners have invested tens of thousands of dollars in the real property owned by them. No persons exist who could have more substantial "private interest[s] that will be affected[26] [adversely] by the official action" of the Board, increasing by millions the value of Associates' property.

The second *Mathews* factor requires examination into the nature of the facts at issue. Clearly, most of the facts necessary for the Board to find in order to grant a variance, specified in § 72-21 of the Zoning Resolution, were "individualized" or "adjudicative" facts. The "unique physical conditions" of the particular property, the "practical difficulties or unnecessary hardship . . . in complying strictly . . ." with the Resolution, whether or not the variance is "necessary to enable the owner to realize a reasonable return . . ." and whether or not the difficulty has been created by the Applicant himself, the facts put in issue by § 72-21, are "about the parties and their activities, businesses, and properties . . . ." Davis, *The Requirement Of A Trial-type Hearing,* 70 Harv.L. Rev. 193, 199 (1956).

The adjudicative nature of the facts relates directly to both "the probative value . . . of [the] additional or substitute safeguards . . ." sought by petitioners and denied by the Board, and "the risk of erroneous deprivation . . . through the procedures used." The "safeguards" sought by petitioners, several of which are among Judge Friendly's "Elements of A Fair Hearing," are discussed below, *seriatim.*

One safeguard was the requirement that the facts be found and that the decision *then* be made. In reversing the order of things, the Board denied Element "9" of Judge

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[26] *See* Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews* v. *Eldridge: Three Factors in Search of a Theory of Value,* 44 U. Chi. L. Rev. 28, 46-54 (1976).

Friendly's fair hearing elements, "a Statement of Reasons." *Friendly* at 1291.

A second "additional safeguard" was some right of cross-examination. The Board assumed that it did not have any discretion to consider the matter. This was in conflict with the weight of authority in other states. *See, e.g., Wadell* v. *Board of Zoning Appeals,* 136 Conn. 1, 68 A.2d 152 (1949).[27]

A third "additional safeguard" sought was some right to subpoena witnesses. Judge Friendly's Elements "4" and "5" are "The Rights to Call Witnesses, [and] to Know the Evidence Against One." *Id.* at 1282.

A fourth "additional safeguard" was the demand that whatever facts the Board ascertained from its "inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board" (Board Answer, par. "28"), be identified and set out in its findings. The Board's failure to do so not only violated New York law, *Application of New York City Housing & Redevelopment Authority* v. *Foley, supra,* but denied to petitioners Element "6" of Judge Friendly's elements, "To Have Decision Based Only on the Evidence Presented." *Id.* at 1282.

A fifth "additional safeguard" was a requirement that all of the principal "testimony" be verified. This, together with cross-examination, has been characterized by the Court of Appeals of New York State, in a context other than zoning, as one of "the traditional safeguards to truthfulness developed in our common-law procedure." *Hecht* v. *Monaghan,* 307 N.Y. 461, 121 N.E.2d 421 (1954). Much of the principal "evidence" before the Board, including the financial data underlying the "reasonable return" determination, was unverified and second or third degree hearsay.

[27] *See also* 2 A. Rathkopf, *The Law of Zoning and Planning* ch. 43 § 3 (1972); 1 E. Yorkley, *Zoning Law and Practice* (2d ed. 1953); *Sullivan.*

Clearly, three of Judge Friendly's Elements of a Fair Hearing" were denied petitioners by the Board. Each other "additional safeguard" sought by petitioners was important for their meaningful participation in the Board's individualized fact finding.

The last of the three *Mathews* factors is that of the "fiscal or administrative burden" that may arise out of the imposition of the "additional safeguards." Petitioners are unable to measure those burdens accurately in dollars or man hours. The one factual analysis which they can point to is the Citizens Union Study, which found that in only eight of 168 variance proceedings studied, were intervenors, consenting or opposing, represented by attorneys. It is unclear how many of the eight or fewer attorneys would avail themselves of any of the "additional safeguards" which this Court might direct if it establishes some minimal standards. What is clear is that ***any*** "additional safeguard" may impose some burden upon the offending agency.

Petitioners do not claim that every one of the procedures denied them is indispensable to procedural due process. They do claim that denial of *all* was unconstitutionally impermissible. They submit that this Court, by the grant of this petition, should enable itself to consider whether zoning variance proceedings may continue to enjoy a constitutionally privileged status.

Conclusion

For the reasons set forth herein, a writ of certiorari should be granted and the judgment below should be reversed.

Dated: March 17, 1978.

Respectfully submitted,

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LAURENCE MAY
Of Counsel

APPENDIX A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 5, 1977.

Present—Hon. Francis T. Murphy, Jr.,
Presiding Justice,
Theodore R. Kupferman,
Herbert B. Evans,
Louis J. Capozzoli,
Justices.

531

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215 East 72nd Street Corporation, James F. Lawrence, Robert G. Knott, Martha McLanahan and Elizabeth Parkinson,

Petitioners-Appellants,

—against—

Joseph B. Klein, as Chairman, Philip P. Agusta, as Vice Chairman, and Harry M. Carroll, John J. Walsh, John B. Cincotta as Members of the Board of Standards and Appeals of New York City, Samuel Lindenbaum, as Applicant, 72nd Street Associates and David Berg,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioners-appellants from a judgment of the Supreme Court, New York County (Helman, J.), entered on February 25, 1977, denying the application and dismissing the petition, and said appeal having been argued by Mr. David Sive

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of counsel for the appellants, and by Mr. Leonard Olarsch, of counsel for the respondent Board of Standards and Appeals, and by Mr. Gilbert S. Edelson, of counsel for the respondents Lindenbaum, 72nd Street and Berg; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

JEROME L. REINSTEIN
Deputy Clerk.

Murphy, P.J., Kupferman, Evans, Capozzoli, JJ.

531 215 East 72nd Street Corporation, et al.,

Petitioners-Appellants,

—against—

Joseph B. Klein, etc., et al.,

Respondents-Respondents.

D. Sive
L. Olarsch
G. S. Edelson

Judgment of the Supreme Court, New York County (Helman, J.) entered February 25, 1977, unanimously affirmed without costs and without disbursements.

Initially, we affirm for the reasons stated at Special Term. As was said in *Matter of Levy* v. *Bd. of Standards*

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& Appeals, 267 N. Y. 347, 351 (Lehman, J.):

> "The Board may act upon its own knowledge of conditions or may make its own survey. 'In that event, however, it must set forth in its return the facts known to its members but not otherwise disclosed.' (*People ex rel. Fordham M. R. Church* v. *Walsh,* 244 N. Y. 280, 287.) The court will not interfere with the exercise of judgment by the Board where the record discloses a basis for the exercise of judgment, but in the return there must be disclosure of facts upon which a reviewing court can determine that, under the statute, the Board had power to grant a variation and that there was scope for the exercise of such judgment."

We are perturbed by the point well presented by the appellant that the Board in granting the application for variances, did not make specific findings, but merely noted that required findings had been made. It was not until the answer and return in this Article 78 proceeding that the facts found, which lead to its conclusions, were disclosed. Further, the Zoning Resolution of the City of New York, § 72-21, requires these findings. Whether this accords with procedural due process, *cf. Goldberg* v. *Kelly,* 397 U. S. 254, is a question properly raised. However, the practice, condoned, if not upheld, by the Court of Appeals has been to allow reliance on findings contained in the return to the petition. *Matter of N. Y. City Housing & Development Bd.* v. *Foley,* 23 A. D. 2d 84, *aff'd without op.,* 16 N. Y. 2d 1071; see *Matter of Elliott* v. *Galvin,* 33 N. Y. 2d 594, 596.

Order filed.

APPENDIX B

Opinion.

SUPREME COURT
NEW YORK COUNTY
Special Term: Part I

In the Matter of the Application of 215 EAST 72nd STREET CORPORATION, JAMES R. LAWRENCE, ROBERT G. KNOTT, MARTHA MCLANAHAN and ELIZABETH B. PARKINSON,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

—against—

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. CINOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

HELMAN, J.:

This proceeding is brought pursuant to article 78 of the CPLR for a judgment annulling a determination of the Board of Standards and Appeals of the Board of Standards and Appeals of the City of New York which granted several variances from the strict application of the Zoning Resolution of the City of New York, to the applicant, Samuel Lindenbaum, with relation to the premises located at East 72nd Street and Third Avenue in the City of New

York. The determination of the Board is challenged on the ground that it acted in violation of lawful procedure, disregarded its own Rules of Procedure, acted in an arbitrary and capricious manner and made findings not supported by substantial evidence.

The zoning lot involved in the proceeding occupies the entire blockfront along the east side of Third Avenue, between 71st and 72nd Streets in Manhattan. It is an irregular "L" shaped parcel with a depth of 127 feet east of Third Avenue on 72nd Street and 185 feet along 71st Street. The lot has 4 buildings, 1 occupied by a charitable organization, 2 tenement buildings, and a 1 family building. It has an area of approximately 32,000 square feet and the lot is located in an R10, Ci-5, Ci-9, and R8 zoning district.

In March of 1976 the Borough Superintendent of Manhattan disapproved the application of the owner (Associates) to demolish 2 of the buildings and to construct on about 13,000 square feet of the zoning lot a 35 story building. Generally, the obligations of the Borough Superintendent were concerned with the proposed floor area ratio as related to the maximum specified for that district, the height of the front wall, the number of rooms and the minimum distance between buildings, as well as required parking space.

On March 23, 1976, Associates appealed to the Board pursuant to Section 72-21 of the Zoning Resolution and Section 666 of the City Charter for a variance. In accordance with the Board's Rules of Procedure, the local Community Board was notified of the application. The latter held 2 public hearings at which all residents and property owners who might be affected, were invited. Thereafter, on April 28, 1976 the Community Board voted 29 to 3, to support the application of Associates for a variance.

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On June 22, 1976, a public hearing was held before the Board which was adjourned 3 times for the purpose of affording all interested parties opportunity to present any evidence, testimony or exhibits in opposition to the application. After an inspection by members of the Board of the surrounding area, and following the public hearings, the Board unanimously granted the application on the grounds of practical difficulty and/or unnecessary hardship. It further made each of the required findings under Section 72-21 of the Zoning Resolution. On the basis of the Board's determination at a public session held Sept. 14, 1976, petitioner brought the present proceeding to annul and set aside its determination.

It is fundamental in Zoning Law that the courts do not make new or substitute judgments, but restrict themselves to ascertaining whether there has been illegality, arbitrariness or abuse of discretion (Matter of Lemir Realty Corp. v. Larkin). A presumption exists that the Board's decision is supported by substantial evidence (Matter of First Nat'l Bank v. Sheehan, 30 A. D. 2d 912). The important elements of Section 72-21 which require that prior to granting a variance it must make 5 findings, which are (1) practical difficulties or unnecessary hardship, (2) inability to obtain a reasonable return, (3) the variance will not change the character of the neighborhood, (4) that conditions involving hardship were not self-created, (5) the proposed variance is the minimum to afford relief.

The record shows that the unique physical conditions of the zoning lot based on its irregular shape, the occupancy of other buildings on the lot, its location in 4 separate zoning districts, all contributed to the elements of hardship that would result from the denial of a variance. Of the 32,000 square feet involved in the parcel, only 41 percent of the zoning lot, 13,000 square feet, was available for construction. Evidence was offered that

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if the variance were granted a small return of 4.6 percent on a net cash investment of over $7 million was realizable, and that if the variance were not granted, a return under the requirements of the existing resolution would be less than 1 percent. The subject of financial estimates involved in construction was carefully examined by the Board on the basis of testimony on both sides, and in that regard the court must yield to the demonstrated expertise of the Board members. Similarly, in the area of estimated income and the broad subject of tax shelter benefits, the Board acted within its discretion in using its expert judgment as to the customary cash flow analysis, in evaluating a realistic rate of return for Associates (Crossroads Recreation, Inc. v. Broz, 4 N. Y. 2d 44). Much testimony was given also on the general subject as to whether the proposed development would be detrimental to the neighborhood both with regard to room space, light sufficiency, and ample parking space for automobiles. The record demonstrates that the applicant's position in that regard was amply supported by the proof and that no other conforming use was financially feasible (Matter of Envoy Towers Co. v. Klein, 51 A. D. 2d 925). Little need be said concerning the objection of the opponents of a variance, that the hardship was self-created since that subject was thoroughly examined by the Board. The record contains ample evidence that Associates had sought over a 4 year period to take reasonable measures to conform to the existing resolution, but had run into unforeseeable problems and difficulties.

On the record, therefore, it is clear not only that the Zoning Board had the authority to grant this area variance, but that the same was "minimal" as required by statute, was supported by substantial proof, and was in no respect arbitrary and capricious (Matter of Craig v. Zoning Board of Appeals, 50 App. Div. 887).

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Turning to the contentions of the petitioner that the Board did not follow its own procedural rules and thus deprived petitioners of their constitutional rights, these generally take the form of objections based on the receipt of materials submitted by Associates which were not verified, that the Board did not reply solely on sworn testimony and that petitioners had no opportunity to timely respond to various materials submitted by Associates. It is further urged that there was a lack of opportunity to cross-examine witnesses and to obtain copies of documents upon which Associates relied.

Our courts have for a great many years accepted the general principle that statements of witnesses before the Board do not have to comply with the technical requirements applicable to court testimony. They need not be under oath, and the Board may act without any witnesses at all, because it is made up of men with special qualifications of training and experience (People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N. Y. 280; Matter of Von Kohorn v. Morrell, 9 N. Y. 2d 27). It appears from this record that the opponents of this variance were heard at length, and presented extensive materials to the Board in the course of several hearings from June 22 to Aug. 20, 1976. No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance. Nor was the failure to conduct lengthy examinations a denial of their rights. A cross-examination at this type of hearing is frequently disruptive, and is uncommon at Board hearings (2 Anderson, N. Y. Zoning Law and Practice 20.16).

In all, the Board's rules provide adequate protection for all interests affected by the issuance of zoning vari-

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ances, and in this case it is clear from the record that the Board adhered to its rules scrupulously. The court finds on the entire record that the Board acted in full compliance with applicable rules of law and its own Rules of Procedures. Its determination will in all respects be affirmed. The petition will be dismissed. Settle order.

Dated: February 3, 1977.

NATHANIEL T. HELMAN,
J. S. C.

Appendix C, Order Court of Appeals, State of New York.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A.D. 1977

Present, Hon. Charles D. Breitel, *Chief Judge, presiding.*

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1 Mo. No. 1141

In the Matter of
the Application of 215 East 72nd Street Corporation, & ors., Appellants,
For a Judgment &c.

vs.

Joseph B. Klein, as Chairman, & ors., as Members of the Board of Standards and Appeals of the City of New York, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

(Seal)